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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 OSCAR OLIVAS,

11 Plaintiff-Petitioner,

12 v.

13 BILLY WHITFORD, Port Director of
14 Calexico West Port of Entry, Customs
15 and Border Patrol, PETE FLORES,
16 Director of Field Operations, San
17 Diego Field Office, Customs and
18 Border Protection; R. GIL
KERLIKOWSKE, Commissioner of
Customs and Border Protection; JEH
JOHNSON, Secretary of Homeland
Security; and JOHN KERRY,
Secretary of State,

Defendants-Respondents.

CASE NO. 14cv1434-WQH-BLM

ORDER

19 HAYES, Judge:

20 **I. Background**

21 On June 12, 2014, Plaintiff-Petitioner filed a Petition for a Writ of Habeas Corpus
22 and Complaint for declaratory and injunctive relief against Defendants Billy Whitford,
23 Pete Flores, R. Gil Kerlikowske, Jeh Johnson, and John Kerry. (ECF No. 1). In
24 addition to the petition for habeas relief, Plaintiff-Petitioner alleged four claims: (1)
25 Right of U.S. Citizen to Return to United States under the Fifth and Fourteenth
26 Amendments and the Non-Detention Act; (2) Right of U.S. Citizen Against Unlawful
27 Detention under the Fifth and Fourteenth Amendments and the Non-Detention Act; (3)
28 Violation of Fifth Amendment (Procedural Due Process); and (4) Violation of Fifth

1 Amendment (Substantive Due Process).¹

2 On June 28, 2016, the Court issued an Order denying the Petition for Writ of
3 Habeas Corpus. (ECF No. 167).

4 On July 21, 2016, Plaintiff-Petitioner filed a motion for entry of judgment under
5 Federal Rule of Civil Procedure 54(b). (ECF No. 171). Plaintiff-Petitioner requested
6 that the Court enter judgment on the Petition for Writ of Habeas Corpus and the first
7 and second claims of the Complaint, asserting that the first and second claims were
8 “effectively disposed of” in the June 28, 2016 Order. (ECF No. 171-1 at 2).
9 Defendants-Respondents opposed the request for entry of Rule 54(b) judgment on the
10 first and second causes of action because the claims have not been adjudicated. (ECF
11 No. 175).

12 On August 23, 2016, the Court denied the motion for entry of judgment under
13 Rule 54(b). (ECF No. 180). The Court determined that judgment could not be entered
14 on the first and second claims because neither claim had been adjudicated. This Court
15 stated that “the four remaining claims have not been adjudicated and present issues
16 intertwined with the habeas claim to such an extent that resolving all claims prior to an
17 appeal will serve the interests of justice.” *Id.* at 2-3. The Court concluded that “the
18 parties have not demonstrated that resolving the remaining claims would require
19 lengthy delay sufficient to justify granting the Rule 54(b) motion.” *Id.* at 3.

20 On August 29, 2016, Plaintiff-Petitioner filed a Notice of Appeal to the Ninth
21 Circuit at to the Order denying his Petition for Writ of Habeas Corpus. (ECF No. 181).
22 On September 6, 2016, the Court ordered both parties to show cause why this case
23 should not be stayed during the pendency of the appeal. (ECF No. 185). On
24 September 12, 2016, Plaintiff-Petitioner filed a response to the order to show cause.
25 (ECF No. 186). Plaintiff-Petitioner stated that he filed the “protective notice of appeal.”

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27 ¹ Magistrate Judge Barbara L. Major stayed discovery on the four non-habeas
28 claims pending the resolution of the habeas claim (ECF No. 88), however, a stay of the
case has not been entered on claims one through four.

1 *Id.* at 1. Plaintiff-Petitioner requested that “the Court adopt the Habeas Order as
 2 findings [of] fact and conclusions of law under Fed. R. Civ. P. 52(a) with respect to all
 3 claims in the complaint” and “enter final judgment under Fed. R. Civ. P. 58.” *Id.* at 4,
 4 5. On September 12, 2016, Defendants-Respondents filed a response to the order to
 5 show cause. (ECF No. 187). Defendants-Respondents stated that due to this Court’s
 6 “findings and conclusions in its June 28, 2016 habeas denial [Doc. 167], this Court
 7 lacks subject matter jurisdiction to hear most if not all of Plaintiff-Petitioner’s non-
 8 habeas claims” under 8 U.S.C. § 1252(g). *Id.* at 2.

9 On September 26, 2016, the Ninth Circuit Court of Appeals issued an order
 10 stating, in part,

11 It appears that the USDC’s order challenged in this appeal may not have
 12 disposed of the action as to all claims and all parties. Within 21 days after
 13 the date of this order, appellant shall move for voluntary dismissal of this
 appeal or show cause why it should not be dismissed for lack of
 jurisdiction.

14 (ECF No. 193). On September 20, 2016, Plaintiff-Petitioner filed a supplemental brief
 15 in response to the order to show cause requesting that the Court “adopt its [Order
 16 denying the Petition for Writ of Habeas Corpus] as findings of fact and conclusions of
 17 law and enter judgment against Plaintiffs on all claims” pursuant to Rule 52 and 58 of
 18 the Federal Rules of Civil Procedure. (ECF No. 196 at 1,3).

19 **II. Discussion**

20 The Supreme Court has held that jurisdiction is transferred from a district court
 21 to a court of appeals upon filing of a notice of appeal. *See Griggs v. Provident*
 22 *Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (“The filing of a notice
 23 of appeal is an event of jurisdictional significance—it confers jurisdiction on the court
 24 of appeals and divests the district court of its control over those aspects of the case
 25 involved in the appeal.”); *Visioneering Constr. & Dev. Co. v. United States Fidelity &*
 26 *Guar.*, 661 F.2d 119, 124 n. 6 (9th Cir. 1981) (“Once a notice of appeal is filed
 27 jurisdiction is vested in the Court of Appeals, and the trial court thereafter has no power
 28 to modify its judgment in the case or proceed further except by leave of the Court of

1 Appeals.”).

2 Plaintiff-Petitioner requests that this Court adopt the Habeas Order as “findings
3 [of] fact and conclusions of law under Fed. R. Civ P. 52(a) with respect to **all claims**
4 in the complaint.” (ECF No. 186 at 4; *see also* ECF No. 196 at 3) (emphasis added).
5 The Court concludes that Plaintiff-Petitioner’s non-habeas claims have not been
6 adjudicated and therefore a judgment cannot be entered as to all claims in the
7 Complaint.

8 On August 23, 2016 , the Court denied the Rule 54(b) motion filed by Plaintiff-
9 Petitioner because Plaintiff-Petitioner requested an entry of judgment for two claims
10 that had not yet been adjudicated. (ECF No. 180 at 2). Federal Rule of Civil Procedure
11 54(b) provides that “[w]hen an action presents more than one claim for relief . . . the
12 court may direct entry of a final judgment as to one or more, but fewer than all, claims
13 or parties only if the court expressly determines that there is no just reason for delay.”
14 Fed. R. Civ. P. 54(b). Even if a request for entry of judgment under Federal Rule of
15 Civil Procedure 54(b) may have been appropriate for the habeas claim, the Notice of
16 Appeal filed by Plaintiff-Petitioner on August 28, 2016 transferred jurisdiction from
17 this Court to the Ninth Circuit Court of Appeals.

18 Petitioner-Plaintiff contends that this Court has the jurisdiction to enter a
19 judgment pursuant to Rule 52 and Rule 58 of the Federal Rules of Civil Procedure.
20 (ECF No. 186 at 4-5; ECF No. 196 at 2). Plaintiff-Petitioner contends that, “If the
21 Habeas Order is appealable as final, this Court retains jurisdiction to take action in aid
22 of appellate jurisdiction.” (ECF No. 186 at 3). The authority cited by Plaintiff-
23 Petitioner fails to establish that this Court has jurisdiction to enter judgment according
24 to Rule 52 and 58 at this stage in the proceedings. In *In re Silberkraus*, the court
25 recognized “an exception to the general rule [that the filing of a notice of appeal
26 generally divests the trial court of jurisdiction] where the district court aids us in our
27 review.” 336 F.3d 864, 869 (9th Cir. 2003). The exception allowed a bankruptcy court
28 to retain “jurisdiction to publish its written findings of fact and conclusions of law [after


1 the notice of appeal was filed] because they were consistent with the court's oral
2 findings" made before the notice of appeal was filed and because the findings aided the
3 appellate court's review. *Id. In re Silberkraus* does not establish that this Court retains
4 the jurisdiction to adopt the Habeas Order as findings of fact and conclusions of law and
5 enter judgment on all claims, including those that have not been adjudicated. *See also*
6 *Davis v. United States*, 667 F.2d 822 (9th Cir. 1982) (recognizing the same exception
7 by which a "district court may act to assist the court of appeals in the exercise of its
8 jurisdiction" but holding that a post-appeal motion to file an amended complaint did not
9 fall within this exception).

10 The Court concludes that the Plaintiff-Petitioner's filing of the Notice of Appeal
11 divested this Court of jurisdiction to adjudicate related claims and enter judgment. This
12 Court cannot proceed further except by leave of the Court of Appeals.

13 **III. Conclusion**

14 This case shall be stayed during the pendency of the appeal.

15 DATED: October 27, 2016

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17 **WILLIAM Q. HAYES**
18 United States District Judge
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